

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

LOUIS M. GAST

Claimant

VS.

ALLEN PRESS, INC.

Respondent

AND

CINCINNATI INSURANCE CO.

Insurance Carrier

Docket No. 1,019,928

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the December 19, 2011, Post Award Medical Order entered by Administrative Law Judge Brad E. Avery. The Director appointed Joseph Seiwert to serve as Appeals Board Member Pro Tem in place of recused Board Member Gary R. Terrill. Dennis L. Horner, of Kansas City, Kansas, appeared for claimant. D'Ambra M. Howard, of Overland Park, Kansas, appeared for respondent. The Board placed this matter on its summary docket for disposition without oral argument.

The Administrative Law Judge (ALJ) designated Dr. Maribeth Orr as claimant's sole authorized treating physician. The ALJ ordered that Dr. Orr be free to prescribe medications she believes to be in the best interest of claimant. The ALJ further ordered respondent to pay claimant's medical expenses and mileage as set out in claimant's Exhibit 1 to the Post Award Medical Hearing.

The Board has considered the record and adopted the stipulations listed in the Post Award Medical Order. The Board further considered the transcript of the Regular Hearing held January 27, 2006, and the exhibits, the transcript of the Motion Hearing held November 1, 2007, and the exhibits, and the transcript of the Settlement Hearing held March 27, 2006, and the attachments.

ISSUES

Respondent requests review of the ALJ's order naming claimant's authorized treating physician as being Dr. Maribeth Orr, asserting that the evidence did not show that claimant's previous health providers' services were unsatisfactory. Even if claimant's health care providers' services were not satisfactory, respondent asserts that claimant is not entitled to nominate his own authorized treating physician. Respondent also argues there is no competent evidence to suggest that claimant's use of Tramadol is reasonable and necessary to cure or relieve the effects of his 2003 accidental injury at work, and it should not be ordered to pay the cost of Tramadol or reimburse claimant for travel expenses to have a prescription for Tramadol filled.¹

Claimant argues that as part of the settlement of his claim, Dr. Carl Inzerillo was authorized to be his treating physician, with monitoring by Dr. Chris Fevurly. When Dr. Inzerillo retired from practice, he referred claimant to Dr. Orr. Claimant contends Dr. Fevurly no longer wishes to provide monitoring of claimant's treatment, but Dr. Orr's treatment continues to be authorized. Claimant further argues that the prescription drug, Tramadol, was originally prescribed by Dr. Fevurly. Further, claimant argues there is no documented or suggested cause for his low back pain other than the work-related accident in 2003. Accordingly, claimant asks that the Board affirm the ALJ's Post Award Medical Order.

The issue for the Board's review is:

- (1) Did the ALJ exceed his jurisdiction by authorizing Dr. Maribeth Orr to be claimant's sole authorized treating physician?
- (2) Is the prescription drug, Tramadol, reasonable and necessary treatment for claimant's work-related accidental injury?
- (3) Is claimant entitled to reimbursement for medical treatment, prescription drugs and related travel expenses?

FINDINGS OF FACT

Claimant began working for respondent in 1995 as a courier. After about three years, he was moved to a job in the warehouse, where he unloaded paper from trucks. He said he would lift cartons of paper that weighed anywhere from 70 to 150 pounds each. He was later moved to the bindery area, where his job included lifting weights from 60 to 120 pounds, as well as bending and stooping. In the summer of 2003, while he was working in the bindery area, he began having muscle spasms in his low back that

¹ Tramadol is also referred to in the record as Ultram, of which Tramadol is the generic equivalent.

worsened up until October 2003. Before then, he had no significant problems with his low back.

Claimant was sent by respondent to Dr. Michael Geist for treatment of his low back, which included physical therapy and injections, neither of which gave him any relief. Claimant testified at the regular hearing that one of his big problems was he was unable to sleep at night. Respondent sent claimant to Dr. Chris Fevurly on March 7, 2005, for an examination. Dr. Fevurly recommended further testing and stated that claimant could use Ibuprofen and Darvocet for pain control. After receiving the results of claimant's MRI and EMG, Dr. Fevurly saw claimant again on March 21, 2005, and diagnosed him with chronic back pain with left leg symptoms. His report of that date stated: "I think it is okay for him to use Darvocet, up to four daily."² Dr. Fevurly's report also stated: "

I recommend that if he is going to continue when the Darvocet ends that this be followed by his primary care doctor in that he is on other medications that may have some potential reaction to the medicines and thus, further testing and following of this medication should be done through one physician."³

On March 27, 2006, claimant and respondent settled claimant's workers compensation claim in a running award with the claimant's right to seek additional medical treatment left open. At that time, Dr. Fevurly was "serving as the authorized treating physician along with Dr. [Carl] Inzerillo who is monitoring the claimant's medication needs."⁴

On September 5, 2006, claimant had an acute flare up of his previous low back pain. Claimant took some Darvocet but developed constipation. Claimant spoke with Dr. Inzerillo and was seen in an "emergency department" on September 5, 2006, where he was given Tramadol and muscle relaxers. Claimant saw Dr. Fevurly on September 12, 2006. Dr. Fevurly opined that claimant's low back pain was caused by a five-hour car trip he had taken the day before the flare-up. Dr. Fevurly examined claimant and stated, "The patient is going to use [T]ramadol, Cymbalta, and muscle relaxers as needed for back pain."⁵

Claimant continued to be followed by Drs. Inzerillo and Fevurly. In Dr. Fevurly's medical note of July 1, 2008, he released claimant from treatment. No mention was made of medication. On April 30, 2009, claimant returned to Dr. Fevurly complaining of sporadic

² Fevurly Depo., Ex. 2 at 15.

³ *Id.*

⁴ Settlement Hearing Trans. at 5.

⁵ Fevurly Depo., Ex. 2 at 9.

low back pain with no provocation. Dr. Fevurly recommended that claimant's sporadic symptoms be treated with Lortab as needed.

At the hearing on claimant's application for post award medical, claimant testified that when his workers compensation claim was settled, both Drs. Fevurly and Inzerillo were designated as authorized treating doctors, but he primarily saw Dr. Inzerillo for his medicine. When Dr. Inzerillo retired, he was referred to Dr. Maribeth Orr, and she prescribed medication for claimant, including Cymbalta and Tramadol. Claimant said he also continued seeing Dr. Fevurly. Claimant testified he told Dr. Fevurly that Cymbalta was not helping him sleep at night and he was still waking up in pain but that Tramadol seemed to work. Claimant said Dr. Fevurly prescribed Tramadol on two occasions. Claimant also got prescriptions for Tramadol from Dr. Orr.

On January 10, 2011, claimant again saw Dr. Fevurly. He advised Dr. Fevurly that he had stopped taking Lortab and Darvocet and was taking Cymbalta on a daily basis. He further told Dr. Fevurly that Dr. Orr had taken over his treatment from Dr. Inzerillo. Dr. Fevurly's report of January 2011 reveals that Dr. Orr had "reinstated [T]ramadol in the last year or so" and that claimant took the Tramadol at bedtime.⁶ Dr. Fevurly examined claimant and diagnosed him with chronic regional low back pain with advanced degenerative multilevel disk disease and bony spondylosis. He opined that "[i]t is reasonable for [claimant] to continue to use Cymbalta and he has been on various analgesics in the past for his flare-ups of his low back pain and most recently the medication of choice is [T]ramadol which he uses one to two at bedtime."⁷ Dr. Fevurly further stated:

[Claimant] has chosen to use [T]ramadol which is a reasonable medication for the sporadic problems with his low back pain. If you ask me whether I think the [T]ramadol is directed to an injury that occurred seven and one-half years ago I would answer unequivocally no. His back pain is expected to continue for the remainder of his life and is related to unrelated degenerative changes throughout his low back"⁸

After receipt of Dr. Fevurly's report of January 10, 2011, respondent's attorney wrote claimant's attorney a letter dated January 25, 2011, indicating that "the employer is not willing to authorize treatment beyond the prescription medication Cymbalta" because it was Dr. Fevurly's opinion that the use of the Tramadol was not related to claimant's work-

⁶ Fevurly Depo., Ex. 2 at 1.

⁷ *Id.*, Ex. 2 at 2.

⁸ *Id.*, Ex. 2 at 2.

related injury.⁹ The letter also stated that Dr. Fevurly was the “only authorized treating physician in the case” but that respondent would be willing to allow Dr. Orr to prescribe Cymbalta.

Claimant returned to Dr. Fevurly on February 8, 2011, complaining he was unable to cope with his current pain and indicating he had not had any Tramadol or Cymbalta for quite some time. Dr. Fevurly continued to be of the opinion that claimant’s pain was the result of his underlying degenerative disc disease in his lumbar spine and had “little or nothing” to do with the work-related injury of 2003.¹⁰ Dr. Fevurly stated:

The issues of ongoing medical care are difficult. I think that he should have one doctor writing his prescriptions for him and this should be his primary care doctor. He is going to have other medical conditions with other medications and it is inappropriate for a Work Comp doctor to be writing prescriptions for these medications in the presence of other medicines and the potential side effects and drug interactions that occur.

. . . . I have no reason to believe that he should see me again. A decision will need to be made legally and by the Work Comp judges whether his chronic use of these medications are cause [*sic*] and related”¹¹

Dr. Fevurly admitted, however, that he gave claimant a prescription for Tramadol on February 8, 2011.

Dr. Fevurly testified he had been reluctantly overseeing prescriptions issued to claimant by Dr. Orr. When he last saw claimant in March 2011, claimant was on Tramadol and Cymbalta for his chronic back pain. Dr. Fevurly did not think claimant’s prescriptions for Tramadol were a result of his work injury of October 27, 2003. Neither does he believe claimant’s current low back pain is the result of the work injury in 2003. He testified he believed claimant reached maximum medical improvement “in the Summer of 2003 [*sic*] from that work event.”¹²

Dr. Fevurly admits claimant has reported that Tramadol has reduced his symptoms. He further stated if claimant wanted to use anti-inflammatory drugs and Tramadol as needed for his chronic back pain, he recommended that Dr. Orr prescribe the medication and monitor claimant for any side effects, because she is the same physician writing prescriptions for his other medical conditions.

⁹ P.A.M. Trans., Resp. Ex. A at 7.

¹⁰ *Id.*, Cl. Ex. 1 at 7.

¹¹ *Id.*

¹² Fevurly Depo. at 6-7.

Dr. Orr testified she has been treating claimant conservatively for his low back pain by prescribing generic Tramadol and Cymbalta under the supervision of Dr. Fevurly. She prescribes Cymbalta for neuropathy related to claimant's back pain and Tramadol for the back pain. Dr. Orr is aware that Dr. Fevurly does not believe the Tramadol is necessary, and she neither agrees nor disagrees with his opinion. Claimant has told her Tramadol relieves his back pain.

Dr. Orr also testified that she cannot directly correlate claimant's need for Tramadol and his work-related accident of October 2003. She stated:

I don't know a lot about his injury. It was a vague description and it has been a vague description to me. He told me he's had back pain this time—starting at this time at his—from his job and that the Tramadol helps. I didn't see him before that, so I don't know—as far as I can read, I don't see a history of back pain prior to the injury.¹³

Dr. Orr agreed hypothetically that if claimant had no back problems before his injury at respondent; was very active; worked in a warehouse lifting, bending, stooping and squatting with no back problems or need for treatment or restrictions, it is more likely than not his need for Cymbalta and Tramadol is related to the injury.

Claimant testified that Tramadol seems to help him, although not as well as it did when he first started that medication. Respondent has denied payment for his prescriptions for Tramadol for February, May and July 2011 but paid for them in December 2010 and January and March 2011. Claimant further stated he had been getting his prescriptions filled at Byrne's Pharmacy in DeSoto, Kansas, which was fairly close to his home. However, at some point he received a card and was told to get his medications at a Walgreens, which required him to travel to Lawrence, Kansas, to have his prescriptions filled. Respondent has refused to reimburse him for the mileage for his travel to Lawrence to have his prescriptions for Tramadol filled.

PRINCIPLES OF LAW

In a post award medical proceeding, the claimant has the burden of proof to establish that his need for post-award medical treatment is causally related to the injury suffered in the underlying accident. An award for additional medical treatment can be made if the trier of fact finds that the need for medical care is necessary to relieve and cure the effects of the original accidental injury which was the subject of the underlying award.¹⁴

¹³ Orr Depo. at 8-9.

¹⁴ K.S.A. 2003 Supp. 44-510k(a).

K.S.A. 2003 Supp. 44-510h(b)(1) states:

If the director finds, upon application of an injured employee, that the services of the health care provider furnished as provided in subsection (a) and rendered on behalf of the injured employee are not satisfactory, the director may authorize the appointment of some other health care provider. In any such case, the employer shall submit the names of three health care providers who, if possible given the availability of local health care providers, are not associated in practice together. The injured employee may select one from the list who shall be the authorized treating health care provider. If the injured employee is unable to obtain satisfactory services from any of the health care providers submitted by the employer under this paragraph, either party or both parties may request the director to select a treating health care provider.

In *Logsdon*,¹⁵ the Kansas Court of Appeals held:

When a primary injury under the Worker's Compensation Act is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.

ANALYSIS

Respondent admits that both Dr. Fevurly and Dr. Inzerillo were designated as claimant's authorized treating physicians. When Dr. Inzerillo retired, he referred claimant to Dr. Orr. Thereafter, both Dr. Fevurly and Dr. Orr were authorized treating physicians. Respondent never withdrew its authorization of Dr. Fevurly, but Dr. Fevurly expressed an intent to no longer treat claimant and suggested a single physician, such as claimant's primary care physician, Dr. Orr, be in control of prescribing and monitoring claimant's medications. Dr. Orr was authorized to monitor claimant's medicines, but in a letter dated January 25, 2011, respondent's counsel said Dr. Orr could only prescribe Cymbalta, not any other medication. In effect, respondent was saying that only Dr. Fevurly could prescribe Tramadol, but Dr. Fevurly was saying he wanted Dr. Orr to prescribe the Tramadol along with claimant's other medications.

Claimant has had ongoing problems with his back since his accident in 2003. At the August 29, 2011, post award hearing, claimant testified he has never been pain free for even a day. Claimant did not have back problems before his 2003 accident, and claimant denies having had any subsequent accidents. The ALJ determined that the medications claimant has been prescribed, including Tramadol, were reasonable and necessary to

¹⁵ *Logsdon v. Boeing Co.*, 35 Kan. App. 2d 79, Syl. ¶ 2, 128 P.3d 430 (2006); see also *Brumbaugh v. Atria*, No. 99,317, unpublished Court of Appeals case filed October 3, 2008.

provide claimant with relief from pain due to the work-related injury. Based upon the testimony of claimant and the opinion of Dr. Orr, the Board agrees.

Dr. Fevurly is not opposed to Tramadol being prescribed to treat claimant's back symptoms and, in fact, prescribed Tramadol for claimant on several occasions. Rather, Dr. Fevurly is no longer of the opinion that claimant's back problems are a direct consequence of his work-related injury. As a result, Dr. Fevurly has released claimant from his care. That either leaves Dr. Orr as claimant's sole authorized treating physician or, if Dr. Orr is no longer authorized by respondent, then claimant is without any authorized treating physician. If respondent is denying claimant's current need for treatment is related to the work injury, it seems to follow that claimant is without an authorized treating physician. If Dr. Orr is authorized to provide some, but not all, of the treatments she believes are reasonable and necessary to treat claimant's back condition, respondent is likewise failing in its responsibility to authorize medical treatment for claimant. Either way, claimant is seeking an order for medical treatment, not a change of treating physician. Therefore, the ALJ was not required to order respondent to submit a list of three health care providers under K.S.A. 44-510h(b)(1).

Claimant is entitled to obtain treatment by an authorized physician unless and until he is disabused of his belief that the physician is authorized.¹⁶ As both Drs. Fevurly and Orr were authorized treating physicians, the medication either one of them prescribed for claimant's back symptoms should be paid as authorized medical expenses. Likewise, claimant's travel expenses to obtain those prescriptions should be reimbursed based upon the actual mileage to and from the pharmacies.

CONCLUSION

(1) The ALJ did not exceed his jurisdiction in authorizing Dr. Orr to continue as claimant's treating physician.

(2) Claimant is entitled to reasonable and necessary treatment to relieve the effects of his work-related injury, including such prescription medications as the authorized physician determines appropriate.

(3) Claimant is entitled to the payment of or reimbursement for the related medical and travel expenses as ordered by the ALJ.

¹⁶ See *Blake v. Hutchinson Manufacturing. Co.*, 213 Kan. 511, 516 P.2d 1008 (1973).

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Post Award Medical Order of Administrative Law Judge Brad E. Avery dated December 19, 2011, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of February, 2012.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Dennis L. Horner, Attorney for Claimant
D'Ambra M. Howard, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge